FILE COPY

IN THE

Supreme Court of the United States

No. 399

ROBERT E. HANNEGAN, as Postmaster General of the United States,

Petitioner

against

ESQUIRE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae,

CHARLES HORSKY,
Of the District of Columbia Bar,

ARTHUR DEHON HILL,
Of the Massachusetts Bar,

LUTHER ELY SMITH,
Of the Missouri Bar,

ARTHUR GARFIELD HAYS,
ASHER LANS,
NORMAN WILLIAMS, JR.,
Of the New York Bar,

GURNEY EDWARDS,
Of the Rhode Island Bar,
of Counsel.

INDEX

Table of Cases Cited

Statutes Cited

Authorities and Publications

IN THE

Supreme Court of the United States

No. 399

ROBERT E. HANNEGAN, as Postmaster General of the United States,

Petitioner,

against

ESQUIRE, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Statement of the Case

This case involves an action to enjoin the enforcement of, and to have declared invalid, an order dated and filed December 30, 1943, made by petitioner's predecessor as Postmaster General of the United States, and revoking the second-class mailing privileges of Esquire Magazine. On July 27, 1944, the United States District Court for the District of Columbia entered a final judgment which dismissed the complaint on the merits, 55 F. Supp. 1015. The Court of Appeals for the District of Columbia reversed, 151 F. (2d) 49, and the Post Office has brought the question up before this Court.

Interest of the American Civil Liberties Union

The American Civil Liberties Union is a nationwide, non-profit organization, whose members are lawyers and

laymen interested in the protection and strengthening of the fundamental personal rights guaranteed to individuals by the Constitution of the United States and by those of the various states.

We have filed a brief because of the extraordinary importance of this case. By a new and unique construction of an innocent-looking provision in the postal laws, the Postmaster General[1] has here started a new policy, apparently to be widely applied, of restricting the circulation of literature through the mails in accordance with his personal opinion of its value. If this construction should be sustained and the Postmaster General should be thus vested with despotic powers of control over access to the mails, then freedom of circulation—which is essential to freedom of the press—will be seriously impaired.

Statute and Order Involved

The issue presented to the Court herein is primarily as to the extent of the petitioner's authority under the second-class mailing statute, 39 U.S.C.A. Sections 224, 226. For convenience, we reprint the entire statute at this point.

> Section 224. "Mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections 225 and 226 of this title."
>
> Section 226. "Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows: First. It must regularly be issued at stated inter-

1. The term refers to the office, not necessarily to a personality. When so treated, the actions of former Postmaster General Frank C. Walker are considered also those of the incumbent.

vals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publication. Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

In the order No. 23459 of December 30, 1943, revoking *Esquire's* second-class mailing privileges, Postmaster General Walker stated the Post Office's current interpretation of the fourth condition in Section 226.

"In arriving at a determination in this particular type of proceeding it is necessary that the Postmaster General recognize the nature, conditions and result of these unique second-class mail privileges because they have been established and are supported and maintained by the people of the United States.

"In nature they are true privileges, specifically called and referred to as such by the postal statutes, and stated by the Supreme Court to be "* * * justified as part of the "historic policy of encouraging by low postal rates the dissemination of current intelligence". It is a frank extension of special favors to publishers because of the special contribution to the public welfare which Congress believes is derived from the newspaper and other periodical press."[2]

2. *Milwaukee Pub. Co. v. Burleson*, 255 U. S. 407, 410.

"Furthermore, to assure that a contribution of that precise character is in fact made, Congress has required that to enjoy these privileges and preferences the publication as a fourth condition 'must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts or some special industry.'[3] . . .

"There are good reasons for this jealous regard by Congress of these extraordinary privileges. . . .

"The plain language of this statute does not assume that a publication must in fact be 'obscene' within the intendment of the postal obscenity statutes before it can be found not to be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry'.

"Writings and pictures may be indecent, vulgar, and risque and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good. When such writings or pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance.

"When, however, they become a dominant and systematic feature they most certainly cannot be said to be for the public good, and a publication which uses them in that manner is not making the 'special contribution to the public welfare' which Congress intended by the Fourth condition.

"A publication to enjoy these unique mail privileges and special preferences is bound to do more than refrain from disseminating material which is

3. Section 14, Act of March 3, 1879 (20 Stat. 359; 39 U.S.C. 226).

obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare.

* * *

"Whatever the featured and dominant pictures, prose, verse and systematic innuendos of this publication may be, they surely are not 'information of a public character' or 'literature, the sciences, arts or some special industry'."

In brief, then, *Esquire* is to lose the use of the second-class rates because the Postmaster General thinks it is quasi-obscene and is not impressed with its literary value.

In this connection the Postmaster General has been equally explicit in announcing the start of a campaign to remove from the second-class rolls many other periodicals not in accord with his literary tastes. In his *Annual Report* for the year ended June 30, 1943, he stated:

"The Department has given continued attention to the character of those publications referred to in my report of last year as being of doubtful eligibility to the second-class postage privilege—a privilege which costs all the taxpayers many millions of dollars a year.

"It is not believed, however, that our citizens then were or now are willing to pay through general taxation part of the postage on magazines which violate the obscenity or the sedition statutes, or which cannot by any stretch of the imagination be construed as published to elevate the mind, or improve public thought, or disseminate information of a public character. The freedom of the press is not here involved. It is a question of correct classification of mail matter under the law.

"It is a duty of the Postmaster General, and a difficult one, to determine whether a publication is

> worthy of the second-class mail privilege. When mistakes through laxity are made the general public pays through taxation. There are differences of opinion among good people as to whether certain publications cater to those who seek impure intellectual pleasures, and whether they endeavor to differentiate between 'mirth and indecency' and 'wit and licentiousness.' Publishers of such magazines as a rule go as far as they dare, hoping they will not be called to account under the laws against obscenity."

In the *Esquire* order, a further indication of the same campaign appears:

> "If this theory is applied, it means that a large number of publications and periodicals of the editorial, fiction and humorous classes, which even though educational, innocent, delightful and entertaining, would not be permitted to use the second-class mailing privileges because they are substantially devoted to literature or art of a classical or high artistic quality."

Summary of Argument

For the following reasons we believe this Court should uphold the Court of Appeals in invalidating petitioner's order of revocation and granting the injunction prayed for by respondent:

1. The so-called "privilege doctrine"—upon which the order attacked herein is based—is an indefensible anachronism in constitutional law.

2. Possession of the second-class mailing privilege[4] is essential to a periodical's ability to circulate

4. We assume it is not necessary to argue with the Postmaster General that use of this term in a popular sense does not imply agreement with all the implications of the so-called "privilege doctrine". But compare the second paragraph of the order as quoted above.

freely and to compete on fair terms for the public's interest, and therefore to the freedom of the press.

3. The Postmaster General's order revoking *Esquire's* right to use of the second-class mailing rates is unconstitutional.

4. The order revoking *Esquire's* second-class mailing privilege transcends the authority vested in the Postmaster General by the federal postal statutes.

5. This Court has plenary power to review the petitioner's construction of the second-class mailing statute. Since the controversy at bar involves fundamental individual liberties, petitioner's determinations on questions of fact are not entitled to the presumption of finality usually attached to administrative findings.

POINT I

The so-called "privilege doctrine"—upon which the order attacked herein is based—is an indefensible anachronism in constitutional law.

In Postmaster General Walker's opinion, accompanying and purporting to justify the order barring *Esquire* from the second-class rates, the order is grounded expressly on the theory that use of the second-class rates is an "extraordinary privilege". By this language the Postmaster General reaffirmed the so-called "privilege doctrine" *i.e.*, that Congress has plenary control over the mails and can grant or withhold access to the mails on any terms it sees fit—and incidentally brought that doctrine over into the question of mail classification. The

order's reliance for this point on *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407,[5] is equally clear. While we are convinced that this Court could invalidate the Postmaster General's order on narrower grounds, e. g., because it exercises authority not conferred by the statute and because it is not supported by the facts adduced at the administrative hearings, it is clear that the Court cannot *uphold* the Postmaster General's order and the District Court—particularly on any theory of administrative finality—without accepting and reaffirming the "privilege doctrine". Since the Post Office has raised the question directly in this way, and indicated that it is planning a censorship campaign in reliance on the "privilege doctrine", we believe it is incumbent on this Court to reassay the validity of this theory.

While the constitutional guarantees of free expression have existed all through our history, their implementation by a spirit of active judicial enforcement and a series of specific rules has been primarily a development of the last twenty-five years. During this period the courts have repeatedly recognized that, in addition to safeguarding individual rights, the constitutional guarantees of freedom of speech and the press serve to protect the public's interest in the spread of free discussion and the evaluation of differing points of view. Thus it is no longer simply a question of balancing the individual's (or a periodical's) rights against those of the state; instead, in analyzing any claim for limiting free expression, the alleged evil must be balanced against both the individual's right to speak and the public's interest in hearing all that is to be said.

5. Cited herein also as *Milwaukee Publishing Co.* v. *Burleson* and referred to as the *Burleson* case.

A review of the judicial criteria developed since the first World War to evaluate the constitutional validity of state and federal limitations on free expression will indicate some more specific rules for analyzing these cases. First, the usual presumptions in favor of the constitutionality or legality of official action have in practice, if not fully in theory, been moderated and practically discarded in this field. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152, n. 4; *Schneider* v. *State*, 308 U. S. 147; *Stromberg* v. *California*, 283 U. S. 359; *Lovell* v. *City of Griffin*, 303 U. S. 444; *Thomas* v. *Collins*, 323 U. S. 516; Lusky, *Minority Rights and the Public Interest* (1942), 52 Yale L. Journal 1. Second, legislation or administrative regulations which are worded so broadly that they can be construed to restrict admittedly proper discussion, along with discussion which may be subject to regulation, have been held to be invalid on their face. *Stromberg* v. *California*, *supra*; *Lovell* v. *City of Griffin*, *supra*; *Thornhill* v. *Alabama*, 310 U. S. 88, 96-98; *Taylor* v. *Mississippi*, 319 U. S. 583. Third, there must be a close connection between the speech and the evils in question: it has been generally held that, in order to justify a limitation on the expression of ideas, it must be shown that some evils within the reach of preventive governmental power would be *likely* to arise as an *immediate result* of the statements in question—the so-called "clear and present danger rule". *Schenck* v. *United States*, 249 U. S. 47; *Whitney* v. *California*, 274 U. S. 357, 377 (concurring opinion by Mr. Justice Brandeis); *Herndon* v. *Lowry*, 301 U. S. 242; *Bridges* v. *California*, 314 U. S. 252; *Thomas* v. *Collins*, *supra*. The fourth consideration—and this is often considered as another part of the "clear and present danger" rule—is the seriousness of the danger; in cases

where some sort of harm is admittedly likely to occur as a result of untrammeled discussion, before a restraint may be exercised it must also be shown that the evil is so serious or the possibility of subsequent redress so futile as to overbalance the public interest in the free dissemination of ideas. *Near* v. *Minnesota*, 283 U. S. 697; *United States* v. *Carolene Products Co.*, *supra*; *Schneider* v. *State*, *supra*; *Bridges* v. *California*, *supra*; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624.

The wide extent and pervasive spirit of the judicial outlook which has been developed since 1920 in these "civil liberties cases" can only be appreciated by a brief review of the treatment accorded specific problems. The most striking evidence of the change has appeared in this Court's willingness to change its approach on apparently settled problems. Thus in at least two important instances the decisions in recent years have run directly contrary to those made in the early 1900's.

1. In *Patterson* v. *Colorado*, 205 U. S. 454, a proceeding involving charges of contempt of court, doubts were expressed as to whether any federal judicial safeguards existed to protect free discussion against interference by state government. But in *Gitlow* v. *New York*, 268 U. S. 652, and in *Fiske* v. *Kansas*, 274 U. S. 380, the Fourteenth Amendment was invoked to provide just such a protection. And in *Bridges* v. *California*, *supra*, the guarantee of the Fourteenth Amendment was specifically applied to restrict liability for statements which were the subject of a contempt proceeding in a state court.

2. In *Davis* v. *Massachusetts*, 167 U. S. 43, it was held that there was no constitutional right to make speeches in municipal parks. But in *Hague* v. *CIO*, 307

U. S. 496, the Fourteenth Amendment was found to protect freedom of speech in city streets and parks against arbitrary curtailment.

The recent vigilance shown by this Court to protect intellectual freedom has been exemplified in decisions dealing with a wide variety of types and media of communications. In the case of statements which allegedly endangered military morale, it was first and eloquently indicated that safeguards existed against arbitrary restrictions. *Schenck* v. *United States, supra; Abrams* v. *United States,* 250 U. S. 616, 624; *Gilbert* v. *Minnesota,* 254 U. S. 325, 334. See *Hartzel* v. *U. S.*, 322 U. S. 680, and *Baumgartner* v. *U. S.*, 322 U. S. 665. Speeches advocating violent overthrow of the government have been held subject to restraint only where there was actual danger of insurrection. And an attempt to prohibit speech systematically exercised to defame a religious group, without involving an immediate danger of violence, was overruled in *Cantwell* v. *Connecticut,* 310 U. S. 296. Advocacy of trade union organization by speeches, peaceful picketing, and similar devices has been recognized as a constitutionally protected form of free speech, in *Thomas* v. *Collins, supra, Thornhill* v. *Alabama, supra,* and *A. F. of L.* v. *Swing,* 312 U. S. 321. The analogous right of assembly was vigorously upheld in *DeJonge* v. *Oregon,* 299 U. S. 353.

Freedom of the press has also been specifically protected against governmental curtailment under the new approach. *Near* v. *Minnesota, supra; Grosjean* v. *American Press Company,* 297 U. S. 233. And a particularly strict opposition was voiced in these cases against any form of previous restraint on publication or circulation. The distribution of leaflets has been accorded a similar

right of freedom from restraint on circulation. *Lovell* v. *City of Griffin, supra; Schneider* v. *State, supra; Murdock* v. *Pennsylvania,* 319 U. S. 105; *Martin* v. *City of Struthers,* 319 U. S. 141; *Douglas* v. *City of Jeannette,* 319 U. S. 157. In fact, the new approach has already been applied, universally and without exception, in judicial protection of free expression in all the major media of communication—except for two, motion pictures and the mails, in which the question has not been passed on by this Court since 1920. See *Associated Press* v. *United States,* 65 Sup. Ct. 1416; *Columbia Broadcasting System* v. *United States,* 316 U. S. 407; *National Broadcasting Company* v. *United States,* 319 U. S. 190.[6]

The new judicial attitude of active protection of civil liberties has already invaded two spheres in which the federal government had traditionally been held to possess "plenary powers"—the question of deportation from the country of aliens and of imported literature, on the ground of supposed undesirability. In this realm of intellectual mercantilism, the time-honored policy of administrative finality has been forced to yield, and this Court has recently enforced a strict construction of the relevant statutory provisions in naturalization and deportation proceedings. *Bridges* v. *Wixon,* 89 L. Ed. 1489; *Baumgartner* v. *United States,* 322 U. S. 665; *Schneiderman* v. *United States,* 320 U. S. 118; *Kessler* v. *Strecker,* 307 U. S. 22. Similarly, in the lower federal courts, the power of the customs officials under 46 Stat. 680, 19 U.S.C.A. Section 305, to ban the importation of books into the United States because of "obscenity" has been strictly construed. *United States* v. *One Book Called "Ulysses",* 5 F. Supp.

6. But compare *Mutual Film Corp.* v. *Industrial Comm. of Ohio,* 236 U. S. 230; *Milwaukee Publishing Co.* v. *Burleson,* 255 U. S. 407.

182, aff'd, 72 F. (2d) 705; *Parmelee* v. *United States*, 113 F. (2d) 729.

It is difficult seriously to suggest today that the mails are not an equally important medium for the dissemination of intelligence. Yet a strikingly anachronistic contrast to the tenor and philosophy of the above cases appears in the present state of the law governing communication through the use of the mails. Actually this is hardly surprising; for the doctrine controlling this field was settled in the late nineteenth century, in a group of fraud and lottery cases. And, because of this circumstance that no important cases involving exclusion from the mails have arisen since the early 1920's, the postal powers have never been examined broadly in the light of the policy of wide judicial protection of freedom of communication, as embodied in recent interpretations of the First Amendment.

It should be remembered that the Postmaster General's order under attack herein, and the opinion of the District Court, are both clearly predicated on the so-called "privilege doctrine". Unquestionably the older fraud and lottery cases, and one leading wartime case, contain language which give this theory an almost unlimited scope. But a resumé of the history of the "privilege doctrine" will suffice to indicate that the Postmaster General has here sought to extend his powers to a degree hitherto unprecedented, far beyond what has been actually decided in previous cases. More fundamentally, we contend that the whole doctrine is an outmoded concept which cannot survive direct judicial re-examination.

We begin with a short historical summary. The extent of the postal power was almost completely ignored at the

Constitutional Convention, and only the slightest attempt was made to control the content of the mails until after the Civil War. But in the 1860's and 1870's lotteries and fraudulent promotion schemes became a serious problem on a national scale, and these operated through the use of the mails. Accordingly, statutes were passed excluding from the mails any *specific individual* material used in connection with any lottery enterprise or any scheme to defraud, 15 Stat. 196; 17 Stat. 323. At about the same time, a statute was adopted excluding from the mails obscene material, 13 Stat. 507.

It was against this background that the "privilege doctrine" appeared and grew. When promoters of shady schemes challenged the restrictive statutes, this Court gave them short shrift. In *Ex parte Jackson*, 96 U. S. 727, the first important case, a promoter challenged the statute excluding lottery material from the mails. The Court stated broadly and without any further analysis that the power to establish a postal system and the "right to designate what shall be carried necessarily involves the right to determine what shall be excluded" (96 U. S. at 732). However, the Court immediately added important limitations on this unnecessarily latitudinous language. In discussing the relation between freedom of the press and the right of access to the mails, the Court declared:

> "Liberty of circulating is as essential to that freedom as liberty of publication, indeed, without that circulation, the publication would be of little value.
>
> "The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mailable mat-

7. See Rogers, *The Postal Power of Congress* (1916) (John Hopkins University Studies, Series XXXIV No. 2); Deutsch, *Freedom of the Press and the Mails* (1938), 36 Mich. L. Review 703.

> ter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail." (96 U. S. at 732-733.)

The Court then added that free access to the mails was not necessary, since other means of circulation were available. Thus it is clear that even the *Jackson* case took note of the possible conflict between Post Office regulations and freedom of communications, and unhesitatingly preferred the latter.

In succeeding cases, this doctrine—that the use of the mails was a privilege which could be extended or withheld by the government on any grounds whatever—was often repeated, without any real analysis or much mention of the freedom-of-the-press caveat of the *Jackson* case. *In re Rapier*, 143 U. S. 110, again involved denial of the mails to lottery material. In *Public Clearing House* v. *Coyne*, 194 U. S. 497, involving an obviously fraudulent scheme, the Court stated that "the legislative body in thus establishing a postal service may annex such conditions to it as it chooses" (194 U. S. at 506), and sanctioned postal refusal to deliver the mail in question. Once again the language was broader than the question at bar required. See also *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94.

The first World War provided the first extensive examples of exclusion from the mails of matter because its intellectual content was found undesirable. The Espionage Act of 1917, 40 Stat. 219, 230, 50 U.S.C.A. Section 33, 18 U.S.C.A. Section 343, defined three types of seditious material, and declared that such matter was unmailable. The Post Office's whole policy in administering this section must be considered in the light of the wartime hysteria existing at that time, and resulted in some remarkable in-

terdictions; Veblen's *Imperial Germany and the Industrial Revolution* was recommended for general reading by George Creel and then excluded from the mails, and an issue of the *Nation* was actually excluded by the Postmaster General for criticizing Samuel Gompers.

The leading case arose amid this atmosphere, but on a different point. Some issues of the *Milwaukee Leader*, a Socialist publication, were found unmailable and excluded. The Postmaster General then proceeded on this basis to take action against all *future* issues—and he did this by revoking the *Leader's* second-class mailing permit. In *United States ex rel. Milwaukee Social Democratic Publishing Co.* v. *Burleson*, 255 U. S. 407, the Supreme Court sanctioned this action. First, to set the background, the "privilege doctrine" was accepted by a statement that the government has a "practically plenary power over the mails." (255 U. S. at 411.) Second, the Court apparently—though this is not entirely clear—accepted the Postmaster General's extraordinary theory that, since one issue had been excluded from the mails, the *Leader* did not meet the requirements of being *regularly issued* under the second condition of the second-class mailing statute. Then the Court proceeded to analyze the terms on which Congress intended to grant access to the mails, by a combined consideration of the Espionage Act and the second-class mailing statute. Third—and this is the basic confusion introduced by the *Burleson* case—it was assumed that by passing both acts, Congress intended to assimilate the criteria for mailability under the Act of 1917 into the requirements for the second-class rates under the Act of 1879. In other words, if a particular number of a periodical was thought to be wholly non-mailable, the Postmaster General would now have his choice of suspending it from the mails or of withdrawing the second-class entry. No

evidence was presented in support of this bit of synthetic interpretation. Fourth, the theory was announced that, if a periodical had repeatedly published material thought to violate the Espionage Act, the purpose of the two acts was to deny the periodical future access to the second-class rates—on the ground that a presumption had been adopted that such action would continue.

The *Burleson* case has striking weaknesses, both as constitutional law and statutory construction. First, it is charged with the hysteria of that time; at one point the majority opinion (seven to two) actually denounced the publisher for undertaking the litigation because it was "futile". Second, as pointed out in vigorous dissents by Mr. Justices Brandeis and Holmes, the majority opinion failed to recognize that, under modern conditions a free press could not exist without access to the mails and the use of the second-class rate. Third, as Mr. Justice Holmes succinctly pointed out, "The question of the rate has nothing to do with the question whether the matter is mailable." (255 U. S. at 437.) And the definition of "mailable matter of the second class", as given in 39 U.S.C.A. Sections 224 and 226 and quoted on page 2, *supra*, appears complete in itself. Fourth, in contrast to the basic conclusion that the Espionage Act was intended to authorize permanent exclusion from the second-class rate, the legislative history of the Act itself is perfectly clear that in Congress the provisions for taking action under the statute were expressly limited to a single issue. As originally introduced, the Act made a specific provision for permanent exclusion from the mails of periodicals found to violate the Act. But, when it was brought to the floor of the House, Representative Volstead (acting as its floor manager) explained that the committee had purposely deleted these provisions:

> "The only power we left in the bill over the mails gives the postmasters the right to exclude treasonable or anarchistic matter—exclude that particular edition, the particular article." (55 Cong. Rec. 1607.)

It is thus perfectly clear that, under the Espionage Act, as in the case of all other statutes involving exclusion from the mails, Congress intended that action taken against alleged violators should be limited to excluding the particular matter found objectionable. No presumption was ever adopted in any Act that alleged violations would continue, and thus justify exclusion of future issues.

A little later, *Leach* v. *Carlile*, 258 U. S. 138, again presented the question of the extent to which previous restraints could be imposed over access to the mails. In dissenting from the prevailing treatment of the fraud order statute, frankly rooted on the "privilege doctrine", Mr. Justice Holmes commented:

> "there are considerations against it that seem to me never to have been fully weighed and that I think it my duty to state." (258 U. S. at 140.)

No major Supreme Court cases on exclusion from the mails have come up since the Supreme Court divided sharply in the *Burleson* and *Leach* cases. (For a few lower court opinions in the 1920's, see *A.C.L.U.* v. *Kiely*, 40 F. (2d) 451; *Gitlow* v. *Kiely*, 44 F. (2d) 227, aff'd 49 F. (2d) 1077, cert. den., 284 U. S. 648.) However, three recent decisions by the Court of Appeals for the District of Columbia have indicated sharp disagreement with the prevailing "privilege doctrine," and—relying heavily on the *Burleson* and *Leach* dissents—developed an approach more into line with the tenor of other recent cases. *Pike* v. *Walker*, 121 F. (2d) 37; *Consumers Union* v. *Walker*, 145 F. (2d)

33; *Esquire* v. *Walker*, 151 F. (2d) 49. Yet the old "privilege" decisions remain, and the Post Office is happily seeking out their broadest possible implications. It can hardly be said that this is a satisfactory state of the law.

Two leading features of recent Post Office censorship policy thus date from the action taken in the *Burleson* case; first, the inauguration—when Congress had expressly amended the statute to limit exclusion (as in all other statutes) to particular issues found objectionable—of a policy of imposing previous restraints over the mails by permanent exclusion of periodicals; and, second, a further confusion between the requirements for mailability and for the second-class rates. The *Esquire* case, and the Postmaster General's statement quoted on pages 4 and 5 *supra*, bear eloquent witness to the considerable extension, and the prospective further extension, of this policy. Now for the first time, under the Postmaster General's "special contribution" theory, a magazine's freedom of circulation would depend upon its appealing to the Postmaster General's ideas on literary merit and public welfare. And, when the Postmaster General begins his campaign against a magazine whose contributors include (and depends for his proof on witnesses who have never heard of) Dreiser, Hemingway, Steinbeck, Maeterlinck, or Gorky (R. 1726)—the future outlook is not promising.

Since the Post Office has seen fit to raise and press the question in this way, we feel that the situation calls for a re-examination of the "privilege doctrine". Of course, it is clear that, after excision of the "privilege doctrine", Congress will retain some power to exclude specific matter from the mails, as from other forms of communication, on the analogy of the police power—on a showing of imminent and serious danger to public morals or safety. In fact the decisions—as distinguished from

the language—of the earlier cases need not be disturbed at all. But the "privilege doctrine", and the system of previous restraints set up in the confusion of the *Burleson* case, cannot survive judicial re-examination.

As has been well said, the dissents of Justices Brandeis and Holmes in the *Burleson* case contained the first explicit attempt to "brush away" the "web of unreality" of the "privilege doctrine". Frankfurter, *Mr. Justice Holmes and the Supreme Court* (1938) 57. The present case calls for the translation of those classic dissents into law.

POINT II

Possession of the second class mailing privilege is essential to a periodical's ability to circulate freely and to compete on fair terms for the public's interest, and therefore to freedom of the press.

In his order of revocation, the Postmaster General took the position that, since the other classes of mail, as well as all non-governmental means of transportation, are still left open to *Esquire*, deprivation of the second class privileges raises no question of freedom of speech or freedom of the press. (Order No. 23459, p. 2.)

This contention ignores the realities of the conditions under which newspapers and magazines are circulated. In his answers (Par. 22), petitioner admitted that more than 25,000 periodicals have established second class entries. Examination of a chart entitled *Comparison of Magazine Circulations for First Six Months 1942-1943* prepared by the Popular Science Publishing Company, as an aid to advertisers, reveals that in both years compre-

hended in the study, more than 50% of the total circulation of 76 leading weekly, bi-weekly and monthly magazines comprised subscription sales.[8] For the most part, such subscription sales were distributed through use of the second class mailing privilege.

We think it is too plain to require detailed demonstration that when a periodical loses its second class mailing privileges, its ability to compete effectively with other periodicals for the public's interest is greatly impaired.[9] Petitioner in his order of revocation frankly conceded that the costs of circulation are greatly increased if a publication is forced to use some other class of the mails. The problem is particularly acute in the case of small town or rural newspapers. As Professor Zechariah Chafee pointed out in his classic book, *Freedom of Speech* (1919), at page 144:

> "A newspaper editor fears being put out of business by the administrative denial of the second-class mailing privilege much more than the prospect of prison subject to a jury trial."

As the Court of Appeals for the District of Columbia stated in *Pike* v. *Walker*, 121 F. (2d) 37 at 39:

> "Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare."

---

8. In 1943 total circulation for the group of magazines included in the study was 65,596,394. Of this total, 34,222,345 represented subscriptions, in almost all cases distributed through the mails. The comparable figures for 1942 were 63,428,602 total circulation, and 34,622,332 subscription sales.

9. On pp. 9-11 of Plaintiff's brief in the District Court, a description is given of the extent to which *Esquire* would be affected if petitioner's order of revocation remained in effect.

It is of course true that the United States is not obligated to continue to maintain the subsidy to periodical circulation embodied in second class rates. But it is equally plain that so long as the privilege is maintained, denial thereof inflicts an unfair competitive disadvantage on publishers, which cannot be justified unless required by the clear mandate of the statute. Worse than that, the unjust deprivation of the second class privileges of a particular periodical has the effect of curtailing freedom of the press by reducing the possibility that the public will be able to enjoy the opportunity to read the particular views of a given publisher, at a reasonable subscription price.[10] Hence there is a clear requirement that as between publishers the administration of the second class rates must be conducted without discrimination. As Mr. Justice Brandeis pointed out in his dissenting opinion in the *Burleson* case:

> "It is argued that although a newspaper is barred from the second-class mail, liberty of circulation is not denied; because the first and third-class mail and also other means of transportation are left open to a publisher. Constitutional rights should not be frittered away by arguments so technical and unsubstantial. • • • But to carry newspapers generally at a sixth of the cost of the service and to deny that service to one paper of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression • • ?".
>
> "The contention that, because the rates are non-compensatory, use of the second-class mail is not a

10. The second class rate subsidy has been intended to benefit the rural population by giving publishers an inducement to distribute widely their papers for popular consumption and education. See 8 Cong. Rec. 2135.

right but a privilege which may be granted or withheld at the pleasure of Congress, rests upon an entire misconception, when applied to individual members of a class. The fact that it is largely gratuitous makes clearer its position as a right; for it is paid for by taxation." (255 U. S. at 431, 433.)

POINT III

The Postmaster General's order revoking Esquire's right to the use of the second-class mailing rates is unconstitutional.

We have already shown that, as a practical matter and under modern conditions, a periodical's freedom depends upon equal access to the second-class mailing rate. In the present proceeding the Postmaster General by order suspended *Esquire's* second-class mailing rights for all future issues regardless of content, because of his personal belief—not even shared by his own appointed Hearing Board—that past issues have not made a "special contribution to the public welfare."

In other words, the Postmaster General construes the statute as empowering him to extend access to second-class rates to those periodicals which he finds contribute to the "public welfare" and to deny it to those which he finds do not so contribute. Similarly, the District Judge would set the Postmaster General up as a super-literary critic, for he thought that, to be eligible, a publication must consist of "good literature", which should "possess merit" and be of desirable type of an educational value"—and, perhaps, that it may not be a cause of juvenile delinquency. 55 F. Supp. at 1019-1020.

The constitutional question raised here is best appreciated by treating the Postmaster General's construction

of the statute as if it were in fact a restatement of the text of the law. The statute would thus read:

> "literature which, in the opinion of the Postmaster General, makes a special contribution to the public welfare"

is entitled to second-class mailing rates.

In other words, the Postmaster General construes the statute as empowering him to extend the right to use second-class rates to those periodicals which he finds contribute to the "public welfare" and to deny it to those which he finds do not so contribute. And the District Judge in terms would set him up as a super-literary critic. Since no definition of the "public welfare" or "information of a public character" is contained in the statute, it is clear that the Postmaster General believes he has been vested with an unlimited power to discriminate between periodicals. The only touchstone for the right to use second-class rates would be that provided by the Postmaster General's personal likes and dislikes. As it can hardly be expected that successive Postmaster Generals would have the same literary tastes or the same conception of the "public interest", the publishing business and the existence of any periodical would be reduced to subjection to the whims and fancies of changing holders of a highly political office. In such a situation publishers could hardly avoid constantly thinking of the dangers of offending those controlling the life of their business, and acting accordingly. It is difficult to imagine any situation, conceivable in this country, which would be less favorable to the continued development of a vigorous and independent press.

We now propose to show that such a law—and therefore an order presupposing one—would be unconstitutional because:

1. It violates directly nearly all the basic rules of civil liberties law that have been laid down by this Court in interpreting the guarantees of the First and Fourteenth Amendments.

2. It is an unwarranted previous restraint on freedom of circulation, in violation of the First Amendment.

3. It involves an unlawful delegation of power—and, moreover, is void for vagueness and authorizes discrimination between individuals, in violation of the Fifth Amendment.

(a) The Postmaster General's extraordinary interpretation of the statute violates nearly all the basic tests used by this Court in interpreting the guarantees of the First and Fourteenth Amendments.

After the intellectual blind imposed by the "privilege doctrine" is removed, it requires only brief discussion to show that the order here involved runs directly *contra* to most of the basic tests and requirements used in connection with freedom of communication, as discussed on pages 9 and 10, *supra*.

Perhaps first of all, civil liberties law requires a public official attempting to restrict freedom of communication to show extraordinarily strong reasons for his action, in order to overcome what is as a practical matter a presumption against constitutionality. See *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 N. Y.; *Schneider* v. *State*, 308 U. S. 147; *Stromberg* v. *California*; 282 U. S. 359; *Lovell* v. *City of Griffin*, 303 U. S. 444; *Thomas* v. *Collins*, 323 U. S. 516. Far from fulfilling this requirement, the proceedings in this case provide a perfect illustration of the absurdity and indignity to which the government always subjects itself in these recurrent campaigns in pursuit of the quasi-obscene.

The Postmaster General not only makes no serious attempt to meet this requirement, but insists upon the opposite doctrine of administrative finality—probably sensing that his case not only cannot meet the requirement, but is itself in severe need of help. Since no claim of expertise can be made on a subject like quasi-obscenity—and certainly the Post Office could not sustain such a claim on this record—this argument for administrative finality is in effect an argument for the proposition that the Postmaster General's actions are less reviewable in court because he is not a popularly elected but rather an appointive official. This theory will be dealt with in Point V.

Another equally important requirement is even more clearly violated by the *Esquire* order. If statutes or general regulations are worded so broadly that they may be construed to restrict admittedly proper discussion, along with some that is harmful, these regulations are invalid on their face. *Stromberg* v. *California*, 283 U. S. 359; *Lovell* v. *City of Griffin*, 303 U. S. 444; *Thornhill* v. *Alabama*, 310 U. S. 88, 96-98; *Taylor* v. *Mississippi*, 319 U. S. 583. It is here only necessary to compare with this requirement the leeway afforded the Postmaster General in his own interpretation of the statute: the second-class rates, and so free circulation, are in effect restricted to "literature which, in the opinion of the Postmaster General, makes a special contribution to the public welfare".

The third test, the "clear and present danger test" involving the connection between speech and the dangers feared, has to do largely with the effect of speech in advocating revolution or possibly affecting military morale.

The fourth test requires the evils feared to be so serious as to overbalance the public interest in the free

dissemination of ideas. *Near* v. *Minnesota*, 283 U. S. 697; *United States* v. *Carolene Products Co.*, 303 U. S. 144, 152, n. 4; *Schneider* v. *State*, 308 U. S. 147; *Bridges* v. *California*, 314 U. S. 252; *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624. Now, as the Postmaster General's ideas on the evils expected from the circulation of *Esquire* have been developed in these proceedings, they have brought together such an extraordinary collection of trivia that it is impossible to choose among them to illustrate the application of this doctrine.

(b) The First Amendment prohibits previous restraints on freedom of the press and of circulation, except in cases of imminent public danger.

To appreciate the actual results of the Post Office Department's practice of suspending the use of second-class mailing rates, it is again necessary to break through the intellectual blind imposed by the "privilege doctrine", and examine the actual effects of the present order. First, it operates directly as a previous restraint against the publication and circulation of a periodical. Second, this restriction is aimed not against one issue, adjudged harmful, but against all future issues, regardless of their content.

Apart from current Post Office practice, almost the only direct previous example of such a censorship was reviewed in *Near* v. *Minnesota*, 283 U. S. 697. There a state statute provided for suppression as a nuisance of any periodical which was obscene or defamatory, and on this the Court's position was strong and clear-cut. In holding the law unconstitutional, Mr. Chief Justice Hughes said:

> "If we cut through mere details of procedure, the operation and effect of the statute in substance is that public authorities may bring the owner or

> publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.
>
> "The question is whether a statute authorizing such proceeding in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication." (283 U. S. at 713.)

Again, in *Grosjean* v. *American Press Co.*, 297 U. S. 233, the late Long regime in Louisiana attempted to restrict the press in that state; and the device used was a tax on all newspapers having a circulation over a certain figure. Recognizing the dangers inherent in any attempt to penalize or restrict circulation, this Court unanimously struck it down, saying:

> "The form in which the tax is imposed is in itself suspicious. It is not measured or limited by the volume of advertisements. It is measured alone by the extent of the circulation of the publication in which the advertisements are carried, with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." (297 U. S. at 251.)

More specifically, the Post Office practice of restricting all future issues of a periodical by suspending second-class privileges was cogently discussed in the classic dissents of Mr. Justices Holmes and Brandeis in the *Burleson* cases. As Mr. Justice Brandeis put it:

> "But while he (the Postmaster General) may thus exclude from the mail specific matter which he deems of the kind declared by Congress to be unmailable, he may not, either as a preventive measure or as a punishment, order that in the future issues of a particular paper shall be refused transmission." • • •
>
> • • •
>
> "If such power were possessed by the Postmaster General, he would, in view of the practical finality of his decisions, become the universal censor of publications. For a denial of the use of the mail would be for most of them tantamount to a denial of the right of circulation." (255 U. S. at 421-423.)

And as Mr. Justice Holmes pointed out:

> "On the other hand, the regulation of the right to use the mails by the Espionage Act has no peculiarities as a war measure, but is similar to that in earlier cases, such as obscene documents. Papers that violate the act are declared nonmailable, and the use of the mails for the transmission of them is made criminal. But the only power given to the Postmaster is to refrain from forwarding the papers when received, and to return them to the senders. Act of June 15, 1917, chap. 30, title XII, 40 Stat. at L. 217, 230, Comp. Stat. S. 10,401a, Fed. Stat. Anno. Suppl. 1918, p. 132; Act of May 16, 1918, chap. 75, 40 Stat. at L. 553, 554, Comp. Stat. SS 10,212cc, 10,401d, Fed. Stat. Anno. Suppl. 1918, p. 133. He could not issue a general order that a certain newspaper should not be carried because he

> thought it likely or certain that it would contain treasonable or obscene talk. The United States may give up the Postoffice when it sees fit; but while it carries it on, the use of the mails is almost as much a part of free speech as the right to use our tongue; and it would take very strong language to convince me that Congress ever intended to give such a practically despotic power to any one man. There is no pretense that it has done so. Therefore I do not consider the limits of its constitutional power." (255 U. S. at 437.)

In his dissent in the *Leach* case, Mr. Justice Holmes put it briefly:

> "I cannot understand by what authority Congress undertakes to authorize anyone to determine in advance, on the grounds before us, that certain words shall not be uttered. Even those who interpret the (First) Amendment most strictly agree that it was intended to prevent previous restraints." (258 U. S. at 140-141).

The dissenting opinions in the *Burleson* case have been widely quoted with approval. And it seems likely that they were accepted *sub silentio* by this Court in the *Near* and *Grosjean* cases.

(c) The statute, as interpreted by the Postmaster General envisages an unlawful delegation of power, is void for vagueness, and authorizes arbitrary discrimination between individuals in violation of the Fifth Amendment.

The "special contribution" theory makes the Postmaster General's order unconstitutional for three further reasons. First, even in connection with other business, less intimately connected with our fundamental liberties, it has long been held that regulatory legislation must provide some fairly definite standards for administrative action.

Schechter Brothers v. *United States*, 295 U. S. 495. A statute which purports to authorize the Postmaster General to determine what periodicals possess literary merit and contribute to the public welfare, provides no standard at all and is an unconstitutional delegation of legislative power.

Second, a statute must provide some reasonably definite guide for action, to enable the public to obey the law. The interpretation in the order here would make the statute void for vagueness. *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81; *Lanzetta* v. *New Jersey*, 306 U. S. 451.

Thirdly, as is strikingly apparent in the instant case, such an interpretation would permit the Postmaster General to proceed against whomsoever he pleased. Such purely arbitrary discrimination between individuals is forbidden by the Fifth Amendment. Compare *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Consumers Union* v. *Walker*, 145 F. (2d) 33.

It is of course clear that Congress could repeal the statute which permits periodicals to be carried below cost. Such uniform treatment would not deny freedom of the press. But arbitrary discrimination between periodicals is something quite different. As Mr. Justice Brandeis pointed out in his dissenting opinion in the *Burleson* case:

> "The postal power, like all its (Congress') other powers, is subject to the limitation of the Bill of Rights. * * * The Government might, of course, decline altogether to distribute newspapers; or it might decline to carry any at less than the cost of the service; and it would not thereby abridge the freedom of the press, since to all papers other means of transportation would be left open. But to carry newspapers generally at a sixth of the cost of the service and to deny that service to one paper

> of the same general character, because to the Postmaster General views therein expressed in the past seem illegal, would prove an effective censorship and abridge seriously freedom of expression." (255 U. S. at 430-431).

We believe that once the Federal Government has undertaken to provide a type of service, its obligation to furnish that service without arbitrary discrimination between users and applicants therefor is as clear as the requirement that such conditions of equality be maintained by private common carriers. See *Mitchell* v. *United States*, 313 U. S. 80.

POINT IV

The order revoking Esquire's second class mailing privilege transcends the authority conferred upon the Postmaster General by the Second Class Mailing Statute.

Apart from questions of constitutionality, the decision below should be affirmed and enforcement of the administrative order of revocation enjoined because the second-class mailing statute, 39 U.S.C.A. Section 226, does not confer on the Postmaster General authority to revoke second-class entries for the reasons stated in his opinion.

The alleged statutory basis for the order of revocation is failure to comply with the fourth requirement of the second class mailing statute. This provides that, in order to be mailable at second class rates, a periodical must "be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry and having a legitimate list of subscribers."

The Postmaster General held that:

> "Whatever the featured and dominant pictures, prose, verse, and systematic innuendoes of this publication may be, they surely are not 'information of a public character' or 'literature, the sciences, arts or some special industry'." (R. 5591)

The Postmaster General based this ultimate finding of non-compliance with the fourth requirement of the statute on two factors:

> (1) He found that *Esquire* contained material "bordering on the obscene" and that its success had led to the initiation of other magazines containing imitative material. (Order No. 23459, p 8.)
>
> (2) He held that the fourth condition placed a periodical "under a positive duty to contribute to the public good and welfare" (R. 5588), and that *Esquire* had failed to make such contribution.

1. We fail to see the legal significance of the Postmaster General's declaration (Order No. 23459, p. 8) that *Esquire* contained pictures and materials which, although not "obscene in a technical sense", were vulgar and indecent. We know of no statute which so much as prohibits the mailing of individual issues of periodicals which are "quasi-obscene".

Moreover, under all the statutory provisions pursuant to which the Postmaster General is authorized to declare unmailable certain specified classes of mail, the authority is limited to exclusion of a specific issue, letter, or circular. See 18 U.S.C.A. Section 334, Information relating to contraceptives; 18 U.S.C.A. Section 338(c), Solicitation of procurement of divorces in foreign countries; 39 U.S.C.A. Section 227, Infringement of the copyright laws; 18 U.S.C.A. Section 336, Lotteries; 18 U.S.C.A. Section 334,

Treasonous material; 18 U.S.C.A. Section 335, Libelous material; 18 U.S.C.A. Section 405, Prizefight films; 39 U.S.C.A. Section 256, Schemes to defraud. (The apparent exception read into the Espionage Act of 1917 by this Court's decision in the *Burleson* case is based, as explained *supra* POINTS I and III, upon a misconception of Congressional intent in that statute.)

The traditional and wise legislative predilection against denying f[illegible]ry to the mails to publications, when individual numbers have contained excluded material, was lucidly explained in District Judge Woolsey's opinion in *Gitlow* v. *Kiely*, 44 F. (2d) 227, aff'd 49 F. (2d) 1077, cert. den. 284 U. S. 648:

> "In the Sixty-third Congress, Third Session (1915) a bill, H.R. 20644, was introduced to deny absolutely the use of the mail to any person who, in the opinion of the Postmaster General, 'is engaged or represents himself as engaged in the business of publishing any books or pamphlets of an indecent, immoral, scurrilous or libellous character.' It was objected: The 'bill would invest one man • • • with the power to destroy the business of a publisher without affording any opportunity for trial by jury, according to regular court practice. The punishment which may be inflicted upon a publisher by the Postmaster General under the provisions of this bill is most severe, absolutely depriving him of the privilege of using the United States mails, even for legitimate purposes. • • • Furthermore, this bill makes it possible for the Postmaster General to inflict what is practically a confiscatory penalty, for an offence not clearly defined. • • • Under such circumstances as these it is not safe to leave to the decision of one man, after an ex parte investigation, a decision which will involve the freedom of the press. Trial by jury and a penalty inflicted for each specified act is the

> only safeguard against an arbitrary and tyrannical power.' The bill failed of passage. Hearings before Committee on Post Office and Post Roads, February 1, 1915, on Exclusion of Certain Publications from the Mails, pp. 38, 39, 63rd Cong. 3d sess."

2. Turning next to the "positive contribution" theory, it is obvious that if the second-class mailing statute imposed any such requirement, the mortality rate of American periodicals would mount sharply. The Postmaster General himself recognized the mortuary consequences of adoption of this construction of the statute, saying:

> "If this theory, ('that a useful public purpose' must be served) is applied, it means that a large number of publications and periodicals of the editorial, fiction and humorous classes, even though educational, innocent, delightful and entertaining, would not be permitted to use the second class mailing privileges because they are neither current newspapers nor are they substantially devoted to literature or art of a classical or high artistic quality." (Order No. 23459, p. 5. See R. 1906.)

However, the Postmaster General seemed convinced that this harsh result flowed ineluctably from "the plain meaning of plain words" of the statute. (Order No. 23459, p. 5). With all due respect to the Postmaster General, we submit that it is clear "the plain meaning of plain words" of the statute makes the "positive contribution" theory wholly untenable.

(a) In Points I, II, and III *supra*, it has been demonstrated that if the statute were to be construed as suggested by the Postmaster General, grave doubts would then arise as to whether the statute was not violative of the First and Fourteenth Amendments. Accordingly in

exposition of the statute, it is essential to follow the rule of *United States* v. *Delaware & Hudson Co.*, 213 U. S. 366, 408:

> "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

It follows that the administrative order of revocation, which was explicitly predicated upon the infusion into the second-class mailing statute of the "positive contribution" theory, cannot be sustained.[11]

(b) We do not see how a requirement that periodicals contain "information of a public character" or be "devoted to literature, the sciences, arts, or some special industry" can be expanded into a stipulation that, in order to receive the benefit of second-class rates, they are "under a positive duty to contribute to the public good and welfare". (R. 5588). Palpably the statute seeks merely to stipulate the type of subject matter which must be contained in a periodical. It affords no basis for an interpretation that the subject-matter must meet a prescribed test of quality.

Unless it be contended that Congress envisioned the Postmaster General as "the Lord High Guardian" of literary taste in the United States, it is difficult to see how

---

11. In its original citation, the Post Office Department took the position that *Esquire* was non-mailable because it contained "obscene, lewd and lascivious matter" (R. 3). Presumably this portion of the citation was predicated on 18 U.S.C.A. Sec. 334, making obscene matter unmailable. However, no declaration, whether in the nature of a formal finding of fact or otherwise, was made in the Postmaster General's order of revocation to the effect that *Esquire* contained obscene material. That order was based solely on the conclusion that *Esquire* did not comply with the fourth condition of the second class mailing statute, 39 U.S.C.A. Sec. 226. Accordingly, the Postmaster General may now seek directly or indirectly to support his order of revocation by recitals or inferences that *Esquire* printed "lewd" material. Cf. *S.E.C.* v. *Chenery Corporation*, 318 U. S. 80.

the administrative interpretation of the statute can survive. In gently interring a somewhat analogous attempt by the Postmaster General to exercise censorial control over the mails in *Consumers Union* v. *Walker*, 145 F. (2d) 33, 34, the Court of Appeals for the District of Columbia recently admonished:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence."

Moreover, the invalidity of attempts to read into the description of necessary subject matter in the second-class mailing statute, any qualitative standards, is indicated by the decision in *Payne* v. *National Railway Publishing Co.*, 20 App. D. C. 581, cert. grant., 189 U. S. 512, writ dismissed on motion of Attorney General, 192 U. S. 602. The Postmaster General had enacted a regulation requiring that a publication to be entitled to second-class privileges must "consist of current news or miscellaneous literary matter, or both (not including advertising)." He thereafter revoked the long-standing second-class entry of "The Railway Guide", which published railroad and steamboat timetables and general information concerning the movements of trains and boats. The Court of Appeals, in holding the order invalid, stated in part:

> "It is very clear that the Congress of the United States has not committed to the Postmaster General, or to any one else, the matter of determining what should be carried in the mails as second-class matter, and what as matter of the third class. It has reserved that power exclusively to itself. It has itself made the classification; and it is not competent for the Postmaster General to add anything to the statute or to take anything from it."

(c) As the Postmaster General conceded in his order revoking Esquire's second-class entry, his interpretation of the second-class mailing statute runs counter to that which was continuously promulgated by his predecessors in office from its enactment in 1879 to date. The traditional administrative construction has been that every genuine periodical comes within the compass of the statute. The question of statutory construction thus posed is very analogous to that presented in *Federal Trade Commission* v. *Bunte Bros. Inc.*, 312 U. S. 349, which involved a belated attempt by the F.T.C. to extend its jurisdiction to intrastate trade practices which affected interstate commerce. On this point, Mr. Justice Frankfurter, speaking for the majority, stated:

> "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. • • •" (312 U. S. at 351-352).

See also *Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U. S. 294, 313.

Especially in view of the grave doubts to whether the statute, if interpreted as suggested by the Postmaster General, would be constitutional, we respectfully submit that the Postmaster General should not be permitted to read into the statute an enlargement of his own powers, based upon an interpretation contrary to those announced

by his predecessors and contrary to the views of Congress as evidenced by the long series of specific exclusion statutes.

POINT V

This Court has plenary power to review petitioner's construction of the second class mailing statute. Since the controversy at bar involves fundamental individual liberties, petitioner's determinations on questions of fact are not entitled to the presumption of finality usually attached to administrative findings.

In his order of revocation, the Postmaster General repeatedly referred to the fact that the order was appealable to the courts as one justification for the extreme position he had taken. Thus he stated:

> "* * * it is for our courts to say what this statute means and what limits and restrictions there are upon the use of the second-class mail privileges" (Rec. 5582).

Later petitioner postponed the effective date of revocation for the stated purpose of affording an opportunity:

> "* * * to appeal this order to a court of competent jurisdiction to fully review and settle this matter in which the publication, the Post Office Department, and the general public have such a direct and substantial interest" (Rec. 5593).

Between the date of entry of his order and the commencement of the court review he had expressly invited, the Postmaster General appears to have suffered a change of heart. For the first defense pleaded to the present

action was that in revoking the second class privilege, "the exercise of his (the Postmaster General's) judgment and discretion * * * is not subject to review or control by the Court" (Ans., Par. 32).[12]

We think the Postmaster General's present position is entirely incorrect.

(a) No finality attaches to the Postmaster General's construction of the second class mailing statute.

No proposition is better established than the rule that the ultimate interpretation of statutes is a power vested in the courts. While the views of persons charged with the responsibility of administering statutes are of course entitled to great respect, the final voice under Article III of the Constitution of the United States is that of the judiciary. *Federal Trade Commission* v. *Bunte Bros., Inc., supra; S.E.C.* v. *Chenery Corp., supra; U. S.* v. *American Trucking Ass'ns*, 310 U. S. 534; *F.C.C.* v. *Columbia Broadcasting System*, 311 U. S. 132.

This doctrine has repeatedly been reiterated in cases in which past Postmaster Generals have sought to maintain the proposition that their interpretations of the postal statutes were not subject to judicial review. Thus in dealing with a determination of the Postmaster General with regard to second class privileges in *Lewis Pub. Co.* v. *Wyman*, 152 Fed. 787, the Court stated:

> "The contention of counsel for defendant that the courts have no jurisdiction to re-examine the action of the head of one of the executive departments in matters of this kind cannot be sustained, as it is

12. Compare the *Annual Report of the Postmaster General for the Fiscal Year ended January 30, 1943*, in which it is stated, with reference to deprivations of the second class privilege, that: "Cases decided adversely by the Postmaster General are subject to a review by the courts" (p. 8).

well settled that courts have jurisdiction to re-examine the action of the head of one of the executive departments in matters of this kind when he is either acting without authority of law or in excess of the power granted to him by law, has proceeded in violation of an act of Congress, or has misconstrued the legal effect of the statute under which he is acting" (p. 791).

See also: *Milwaukee Publishing Company* v. *Burleson*, *supra*, the majority opinion, at p. 412; *American School of Magnetic Healing* v. *McAnnulty*, *supra*; *Brooklyn Daily Eagle* v. *Voorhies*, 181 Fed. 579; *Pike* v. *Walker*, *supra*.

(b) Since the controversy at bar involves fundamental individual liberties, petitioner's determinations on questions of fact are not entitled to the presumption of finality usually attached to administrative findings.

(1) The Postmaster General's contention that his findings of fact may not be reviewed at all is just another example of an attempt to resuscitate a long overruled principle of administrative absolutism. Even in mail fraud cases, the courts have always held that the Postmaster General's findings are final only under the same conditions when other administrative findings of fact are final, *i.e.*, only when they are supported by substantial evidence. See *American School of Magnetic Healing* v. *McAnnulty*, *supra*; *Hurley* v. *Dolan*, 297 Fed. 825; *Rosenberger* v. *Harris*, 136 Fed. 1001; *Moxie Nerve Food Co.* v. *Holland*, 141 Fed. 202.

(2) In the case at bar, no real issue of fact is involved. For the determination of whether a particular periodical contains "literature" or "information of a public char-

acter" or pertains to the "arts" is a question of "ultimate fact", which under the circumstances is nothing more nor less than a matter of statutory construction. See *Jacksonville Paper Co.* v. *N.L.R.B.*, 137 F. (2d) 148, 150.

The real basis for the doctrine of administrative finality is the judicial recognition of the expert knowledge of administrative agencies in the fields of their special competence. Concededly the Postmaster General has special knowledge in the determination of a question as to whether a given publication is a "periodical" or is "designed primarily for advertising purposes", entitling his views thereon to special weight. But we know of no reason why his views on the subject of whether particular periodicals contain "literature", publish "information of a public character", or are "obscene" should be entitled to any special consideration. We do not conceive that the Postmaster General is uniquely gifted in evaluating the literary or other merits of publications. Cf. *U. S.* v. *One Book Entitled "Ulysses", supra.*

(3) Since the present case involves, as we have shown above, questions of fundamental personal rights, it is our further contention that the administrators' findings of fact are subject to greater judicial scrutiny than in cases involving property rights.

Long ago it was held that, "Though the law itself be fair on its face * * *, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, * * *, the denial of equal justice is still within the prohibition of the Constitution". *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373.

It has been recognized that the task of determining whether in fact, as distinguished from in theory, freedom

of speech and freedom of press were threatened by statutes could not be performed unless the courts had freedom to examine into the facts of their actual administration.[13] *White* v. *Texas*, 310 U. S. 530; *Pierre* v. *Louisiana*, 306 U. S. 353.

This rule which has been applied even in reviewing the administration of justice in the state courts (*Chambers* v. *Florida*, 309 U. S. 227; *Norris* v. *Alabama*, 294 U. S. 587) is equally applicable in reviewing the determinations of federal administrative agencies. Compare *Mitchell* v. *U. S.*, 313 U. S. 80 with *U. S.* v. *Trucking Co.*, 310 U. S. 344 and *National Ry. Co.* v. *Tenn.*, 262 U. S. 318. See also, *N.L.R.B.* v. *Virginia Electric and Power Company*, 319 U. S. 533. Cf. Mr. Justice (then Attorney General) Jackson's book, *The Struggle for Judicial Supremacy* (1941), pp. 284-5.

---

13. In the majority opinion in *Smith* v. *Allwright*, 321 U. S. 649, 662, Mr. Justice Reed said in part:

"We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation. Despite Texas' decision that the exclusion is produced by private or party action, *Bell* v. *Hill, supra*, Federal courts must for themselves appraise the facts leading to that conclusion. It is only by the performance of this obligation that a final and uniform interpretation can be given to the Constitution; the 'Supreme Law of the Land.' *Nixon* v. *Condon*, 286 U. S. 73, 88; *Standard Oil Co.* v. *Johnson*, 316 U. S. 481, 483; *Bridges* v. *California*, 314 U. S. 252; *Lisenba* v. *California*, 314 U. S. 219, 238; *Union Pacific R. Co.* v. *United States*, 313 U. S. 450, 467; *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, 294; *Chambers* v. *Florida*, 309 U. S. 227, 228."

CONCLUSION

The decision of the Court of Appeals for the District of Columbia should be affirmed.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

CHARLES HORSKY,
Of the District of Columbia Bar,

ARTHUR DEHON HILL,
Of the Massachusetts Bar,

LUTHER ELY SMITH,
Of the Missouri Bar,

ARTHUR GARFIELD HAYS,
ASHER LANS,
NORMAN WILLIAMS, JR.,
Of the New York Bar,

GURNEY EDWARDS,
Of the Rhode Island Bar,
of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 399.—October Term, 1945.

Robert E. Hannegan, as Postmaster General of the United States, Petitioner, *vs.* Esquire, Inc.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[February 4, 1946.]

Mr. Justice Douglas delivered the opinion of the Court.

Congress has made obscene material nonmailable (35 Stat. 1129, 18 U. S. C. § 334), and has applied criminal sanctions for the enforcement of that policy. It has divided mailable matter into four classes, periodical publications constituting the second class.[1] § 7 of the Classification Act of 1879, 20 Stat. 358, 43 Stat. 1067, 39 U. S. C. § 221. And it has specified four conditions upon which a publication shall be admitted to the second-class. § 14 of the Classification Act of 1879, 20 Stat. 358, 48 Stat. 928, 39 U. S. C. § 226. The Fourth condition, which is the only one relevant here,[2] provides:

> "Except as otherwise provided by law, the conditions upon which a publication shall be admitted to the second class are as follows . . . Fourth. It must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some

[1] "mailable matter of the second class shall embrace all newspapers and other periodical publications which are issued at stated intervals, and as frequently as four times a year and are within the conditions named in sections twelve and fourteen." § 10 of the Classification Act of 1879, 20 Stat. 358, 39 U. S. C. § 224. For other periodical publications which are included in second-class matter, see 37 Stat. 550, 39 U. S. C. § 229; 31 Stat. 660, 39 U. S. C. § 230.

[2] The first three conditions are:

"First. It must regularly be issued at stated intervals, as frequently as four times a year, and bear a date of issue, and be numbered consecutively. Second. It must be issued from a known office of publication. Third. It must be formed of printed paper sheets, without board, cloth, leather, or other substantial binding, such as distinguish printed books for preservation from periodical publications: *Provided*, That publications produced by the stencil, mimeograph, or hectograph process or in imitation of typewriting shall not be regarded as printed within the meaning of this clause."

"special industry, and having a legitimate list of subscribers. Nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates."

Respondent is the publisher of Esquire Magazine, a monthly periodical which was granted a second-class permit in 1933. In 1943, pursuant to the Act of March 3, 1901, 31 Stat. 1107, 39 U. S. C. § 232, a citation was issued to respondent by the then Postmaster General (for whom the present Postmaster General has now been substituted as petitioner) to show cause why that permit should not be suspended or revoked.[3] A hearing was held before a board designated by the then Postmaster General.[4] The board recommended that the permit not be revoked. Petitioner's predecessor took a different view. He did not find that Esquire Magazine contained obscene material and therefore was nonmailable. He revoked its second-class permit because he found that it did not comply with the Fourth condition. The gist of his holding is contained in the following excerpt from his opinion:

"The plain language of this statute does not assume that a publication must in fact be 'obscene' within the intendment of the postal obscenity statutes before it can be found not to be 'originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry.'

"Writings and pictures may be indecent, vulgar, and risqué and still not be obscene in a technical sense. Such writings and pictures may be in that obscure and treacherous borderland zone where the average person hesitates to find them technically obscene, but still may see ample proof that they are morally improper and not for the public welfare and the public good. When such writings or pictures occur in isolated instances their dangerous tendencies and malignant qualities may be considered of lesser importance.

"When, however, they become a dominant and systematic feature they most certainly cannot be said to be for the public good, and a publication which uses them in that manner is not making the 'special contribution to the public welfare' which Congress intended by the Fourth condition.

---

[3] Sec. 1 of that Act provides:

"When any publication has been accorded second-class mail privileges the same shall not be suspended or annulled until a hearing shall have been granted to the parties interested."

[4] See 7 Fed. Reg. 3001.

"A publication to enjoy these unique mail privileges and special preferences is bound to do more than refrain from disseminating material which is obscene or bordering on the obscene. It is under a positive duty to contribute to the public good and the public welfare."

Respondent thereupon sued in the District Court for the District of Columbia to enjoin the revocation order. The parties stipulated at a pre-trial conference that the suit would not be defended on the ground that Esquire Magazine was obscene or was for any other reason nonmailable.[5] The District Court denied the injunction and dismissed the complaint. 55 F. Supp. 1015. The Court of Appeals reversed. 151 F. 2d 49. The case is here on a petition for a writ of certiorari which we granted because of the importance of the problem in the administration of the postal laws.

The issues of Esquire Magazine under attack are those for January to November inclusive of 1943. The material complained of embraces in bulk only a small percentage of those issues.[6] Regular features of the magazine (called "The Magazine for Men") include articles on topics of current interest, short stories, sports articles or stories, short articles by men prominent in various fields of activities, articles about men prominent in the news, a book review department headed by the late William Lyon Phelps, a theatrical department headed by George Jean Nathan, a department on the lively arts by Gilbert Seldes, a department devoted to men's clothing, and pictorial features, including war action paintings, color photographs of dogs and water colors or etchings of game birds and reproductions of famous paintings, prints and drawings. There was very little in these features which was challenged. But petitioner's predecessor found that the objectionable items, though a small percentage of the total bulk, were regular recurrent features which gave the magazine its dominant tone or characteristic. These include jokes, cartoons, pictures, articles, and poems. They were said to reflect the smoking-room type of humor, featuring, in the main, sex. Some witnesses found the challenged items highly objectionable, calling them salacious and indecent. Others thought they were

[5] It was not contended that Esquire Magazine does not comply with the first three conditions of 39 U. S. C. § 226, set forth in note 2 *supra*.

[6] Items taking up a part or all of 86 pages out of a total of 1072 pages.

only racy and risque. Some condemned them as being merely in poor taste. Other witnesses could find no objection to them.

An examination of the items makes plain, we think, that the controversy is not whether the magazine publishes "information of a public character" or is devoted to "literature" or to the "arts". It is whether the contents are "good" or "bad". To uphold the order of revocation would, therefore, grant the Postmaster General a power of censorship. Such a power is so abhorrent to our traditions that a purpose to grant it should not be easily inferred.

The second-class privilege is a form of subsidy.[7] From the beginning Congress has allowed special rates to certain classes of publications. The Act of February 20, 1792, 1 Stat. 232, 238, granted newspapers a more favorable rate. These were extended to magazines and pamphlets by the Act of May 8, 1794, 1 Stat. 354, 362. Prior to the Classification Act of 1879, periodicals were put into the second-class,[8] which by the Act of March 2, 1863, 12 Stat. 701, 705, included "all mailable matter exclusively in print, and regularly issued at stated periods, without addition by writing, mark, or sign." That Act plainly adopted a strictly objective test and left no discretion to the postal authorities to withhold the second-class privilege from a mailable newspaper or periodical because it failed to meet some standard of worth or value or propriety. There is nothing in the language or history of the Classification Act of 1879 which suggests that Congress in that law made any basic change in its treatment of second-class mail, let alone such an abrupt and radical change as would be entailed by the inauguration of even a limited form of censorship.

The postal laws make a clear-cut division between mailable and nonmailable material. The four classes of mailable matter are generally described by objective standards which refer in part to their contents, but not to the quality of their contents.[9] The

[7] It was found to be worth $500,000 a year to Esquire Magazine. "A newspaper editor fears being put out of business by the administrative denial of the second-class mailing privilege much more than the prospect of prison subject to a jury trial." Chafee, Freedom of Speech (1920), p. 19[illegible]

[8] Rates on periodicals, designed primarily for advertising purposes or for free circulation, were increased by the Act of July 12, 1876, 19 Stat. 78, [illegible]

[9] Sec. 7 of the Classification Act of 1879, as amended, 39 U. S. C. § 221 provides:

"Mailable matter shall be divided into four classes:

"First, written matter;

"Second, periodical publications;

more particular descriptions of the first,[10] third,[11] and fourth[12] classes follow the same pattern, as do the first three conditions specified for second-class matter.[13] If, therefore, the Fourth condition is read in the context of the postal laws of which it is an integral part, it, too, must be taken to supply standards which relate to the format of the publication and to the nature of its contents, but not to their quality, worth, or value. In that view, "literature" or the "arts" mean no more than productions which convey ideas by words, pictures, or drawings.

If the Fourth condition is read in that way, it is plain that Congress made no radical or basic change in the type of regulation which it adopted for second-class mail in 1879. The inauguration of even a limited type of censorship would have been such a startling change as to have left some traces in the legislative history. But we find none. Congressman Money, a member of the Postal Committee who defended the bill on the floor of the House, stated that it was "nothing but a simplification of the postal code. There are no new powers granted to the Department by this bill, none whatever." 8 Cong. Rec. 2134. The bill contained registration provisions which were opposed on the ground that they might be the inception of a censorship of the press. *Id.*, p. 2137. These

"Third, miscellaneous printed matter and other mailable matter not in the first, second, or fourth classes;

"Fourth, merchandise and other mailable matter weighing not less than eight ounces and not in any other class."

[10] *First class.* "Mailable matter of the first class shall embrace letters, postal cards, and all matters wholly or partly in writing . . ." 39 U. S. C. § 222.

[11] *Third class.* "Mail matter of the third class shall include books, circulars, and other matter wholly in print (except newspapers and other periodicals entered as second-class matter), proof sheets, corrected proof sheets, and manuscript copy accompanying same, merchandise (including farm and factory products) and all other mailable matter not included in the first or second class, or in the fourth class . . ." 39 U. S. C. § 235.

[12] *Fourth class.* "Mail matter of the fourth class shall weigh in excess of eight ounces, and shall include books, circulars, and other matter wholly in print (except newspapers and other periodicals entered as second-class matter), proof sheets, corrected proof sheets and manuscript copy accompanying same, merchandise (including farm and factory products), and all other mailable matter not included in the first or second class, or in the third class as defined in section 235 of this title, not exceeding eleven pounds in weight, nor greater in size than seventy-two inches in length and girth combined, nor in form or kind likely to injure the person of any postal employee or damage the mail equipment or other mail matter and not of a character perishable within a period reasonably required for transportation and delivery." 39 U. S. C. § 240.

[13] See note 2, *supra*.

were deleted. *Id.*, pp. 2137, 2138. It is difficult to imagine that the Congress, having deleted them for fear of censorship, gave the Postmaster General by the Fourth condition discretion to deny periodicals the second-class rate, if in his view they did not contribute to the public good. Congressman Money indeed referred to "the daily newspapers, with their load of gossip and scandal and every-day topics that are floating through the press" as being entitled without question to the second-class privilege. *Id.*, p. 2135. To the charge that the bill imposed a censorship he pointed out that it only withheld the privileged rate from publications "made up simply of advertising concerns not intended for public education"; and added:

> "We know the reason for which papers are allowed to go at a low rate of postage, amounting almost to the franking privilege, is because they are the most efficient educators of our people. It is because they go into general circulation and are intended for the dissemination of useful knowledge such as will promote the prosperity and the best interests of the people all over the country. Then all this vast mass of matter is excluded from that low rate of postage. I say instead of being a censorship upon the press, it is for the protection of the legitimate journals of the country." *Id.*, 2135.

The policy of Congress has been clear. It has been to encourage the distribution of periodicals which disseminated "information of a public character" or which were devoted to "literature, the sciences, arts, or some special industry", because it was thought that those publications as a class contributed to the public good.[14] The standards prescribed in the Fourth condition have been criticized, but not on the ground that they provide for censorship.[15]

---

[14] See Lewis Publishing Co. v. Morgan, 229 U. S. 288, 301; Annual Report of Postmaster General (1892), p. 71.

[15] See Report of the Postal Commission of 1906, H. Doc. 608, 59th Cong., 2d Sess., pp. xxxvi-xxxvii:

> "But in what way can it be said that a requirement that a certain printed matter should be 'devoted to literature' serves to mark it off from anything else that can be put into print. There is practically no form of expression of the human mind that can not be brought within the scope of 'public information,' 'literature, the sciences, art, or some special industry.' It would have been just as effective and just as reasonable for the statute to have said, 'devoted to the interests of humanity,' or 'devoted to the development of civilization,' or 'devoted to human intellectual activity.'
>
> "The prime defect in the statute is, then, that it defines not by qualities but by purposes, and the purpose described is so broad as to include everything and exclude nothing.

As stated by the Postal Commission of 1911, H. Doc. 559, 62nd Cong., 2d Sess., p. 142:

> "The original object in placing on second-class matter a rate far below that on any other class of mail was to encourage the dissemination of news and of current literature of educational value. This object has been only in part attained. The low rate has helped to stimulate an enormous mass of periodicals, many of which are of little utility for the cause of popular education. Others are of excellent quality, but the experience of the post office has shown the impossibility of making a satisfactory test based upon literary or educational values. To attempt to do so would be to set up a censorship of the press. Of necessity the words of the statute — 'devoted to literature, the sciences, arts, or some special industry' — must have a broad interpretation."

We may assume that Congress has a broad power of classification and need not open second-class mail to publications of all types. The categories of publication entitled to that classification have indeed varied through the years.[16] And the Court held in *Ex parte Jackson*, 96 U. S. 727, that Congress could constitutionally make it a crime to send fraudulent or obscene material through the mails. But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 421-423, 430-432, 437-438. Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated. The provisions of the Fourth condition would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions[17] and under-

> "With the exception of a few instances where the publication has been excluded because the information was deemed not to be public, no periodical has ever been classified by the application of tests of this kind. Any attempt to apply them generally would simply end in a press censorship."

[16] As we have seen, the Fourth condition bars admission to second-class privileges of publications, "designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates." Publications of state departments of agriculture were not granted the special rate until the Act of June 6, 1900, 31 Stat. 660, 39 U. S. C. § 230. And that was not done for publications of benevolent and fraternal societies, of institutions of learning, trade unions, strictly professional, literary, historical and scientific societies until the Act of August 24, 1912, 37 Stat. 550, 39 U. S. C. § 229.

[17] See Deutsch, Freedom of the Press and of the Mails, 36 Mich. L. Rev. 703, 715-727.

took to clothe the Postmaster General with the power to supervise the tastes of the reading public of the country.[18]

It is plain, as we have said, that the favorable second class rates were granted periodicals meeting the requirements of the Fourth condition, so that the public good might be served through a dissemination of the class of periodicals described. But that is a far cry from assuming that Congress had any idea that each applicant for the second-class rate must convince the Postmaster General that his publication positively contributes to the public good or public welfare. Under our system of government there is an accommodation for the widest varieties of tastes and ideas. What is good literature, what has educational value, what is [illegible]

---

[18] When Congress has been concerned with the content of matter passing through the mails, it has enacted criminal statutes making, for example, obscene material (35 Stat. 1129, 18 U. S. C. § 344), fraudulent material (35 Stat. 1130, 18 U. S. C. § 338), and seditious literature (40 Stat. 230, 18 U. S. C. § 334) nonmailable in any class. And it has granted the Postmaster General power to refuse to deliver mail for any person whom he finds to be using the mails in conducting lotteries or fraudulent schemes. Rev. Stat. 3929, 39 U. S. C. § 259.

But that power has been zealously watched and strictly confined. See, for example, S. Rep. 118, 24th Cong., 1st Sess., reporting adversely on the recommendation of President Jackson that a law be passed prohibiting the use of the mails for the transmission of publications intended to instigate the slaves to insurrection. It was said, p. 3:

> "But to understand more fully the extent of the control which the right of prohibiting circulation through the mail would give to the Government over the press, it must be borne in mind, that the power of Congress over the Post Office and the mail is an exclusive power. It must also be remembered that Congress, in the exercise of this power, may declare any road or navigable water to be a post road; and that, by the act of 1825, it is provided 'that no stage, or other vehicle which regularly performs trips on a post road, or on a road parallel to it, shall carry letters.' The same provision extends to packets, boats, or other vessels, on navigable waters. Like provision may be extended to newspapers and pamphlets; which, if it be admitted that Congress has the right to discriminate in reference to their character, what papers shall or what shall not be transmitted by the mail, would subject the freedom of the press, on all subjects, political, moral, and religious, completely to its will and pleasure. It would, in fact, in some respects, more effectually control the freedom of the press than any sedition law, however severe its penalties. The mandate of the Government alone would be sufficient to close the door against circulation through the mail, and thus, at its sole will and pleasure, might intercept all communications between the press and the people . . ."

[19] "The foolish judgments of Lord Eldon about one hundred years ago, proscribing the works of Byron and Southey, and the finding by the jury under a charge by Lord Denman that the publication of Shelley's 'Queen Mab' was an indictable offense are a warning to all who have to determine the limits of the field within which authors may exercise themselves." United States v. One Book Entitled Ulysses, 72 F. 2d 705, 708.

fined public information, what is good art, varies with individuals as it does from one generation to another. There doubtless would be a contrariety of views[20] concerning Cervantes' Don Quixote, Shakespeare's Venus & Adonis, or Zola's Nana. But a requirement that literature or art conform to some norm prescribed by an official smacks of an ideology foreign to our system. The basic values implicit in the requirements of the Fourth condition can be served only by uncensored distribution of literature. From the multitude of competing offerings the public will pick and choose. What seems to one to be trash may have for others fleeting or even enduring values. But to withdraw the second-class rate from this publication today because its contents seemed to one official not good for the public would sanction withdrawal of the second-class rate tomorrow from another periodical whose social or economic views seemed harmful to another official. The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted. But Congress has left the Postmaster General with no power to prescribe standards for the literature or the art which a mailable periodical disseminates.

This is not to say that there is nothing left to the Postmaster General under the Fourth condition. It is his duty to "execute all laws relative to the Postal Service." Rev. Stat. § 396, 5 U. S. C. § 369. For example, questions will arise as they did in *Houghton* v. *Payne*, 194 U. S. 88; *Bates & Guild Co.* v. *Payne*, 194 U. S. 106, and *Smith* v. *Hitchcock*, 226 U. S. 53, whether the publication which seeks the favorable second-class rate is a periodical as defined in the Fourth condition or a book or other type of publication. And it may appear that the information contained in a periodical may not be of a "public character". But the power to determine whether a periodical which is mailable contains information of a public character, literature or art does not include the further power to determine whether the contents meet some standard of the public good or welfare.

Affirmed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

---

[20] In the present case petitioner's predecessor said in his report:

"... when the polls of public opinion submitted by the publication are examined, it is found that these pictures were characterized as obscene or indecent by 19 to 22% of the persons interviewed, and that 20 to 26% of the persons polled would object to having them in their homes."

SUPREME COURT OF THE UNITED STATES.

No. 399.—October Term, 1945.

Robert E. Hannegan, as Postmaster General of the United States, Petitioner, vs. Esquire, Inc.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia.

[February 4, 1946.]

Mr. Justice Frankfurter, concurring.

The case lies within very narrow confines. The publication under scrutiny is a periodical. It is therefore entitled to the special rates accorded by Congress provided it is published "for the dissemination of information of a public character, or devoted to literature, the sciences, art . . . ." If it be devoted to "literature" it becomes unnecessary to consider how small an infusion of "information of a public character" entitles a periodical to the second-class mail rates when the bulk of its contents would not otherwise satisfy the Congressional conditions.

Congress has neither defined its conception of "literature" nor has it authorized the Postmaster General to do so. But it has placed a limitation upon what is to be deemed "literature" for a privilege which the Court rightly calls a form of subsidy. Matters that are declared nonmailable (Criminal Code § 211; 35 Stat. 1129, 36 Stat. 1339; 18 U. S. C. § 334) are of course not "literature" within the scope of the second-class privilege. But the Postmaster General does not contend that the periodical with which we are concerned was nonmailable. He merely contends that it was not devoted to the kind of "literature" or "art" which may claim the subsidy of second-class matter. But since Congress has seen fit to allow "literature" conveyed by periodicals to have the second-class privilege without making any allowable classification of "literature", except only that nonmailable matter as defined by § 211 of the Criminal Code is excluded, the area of "literature, the sciences, arts" includes all composition of words, pictorial representation, or notations that are intelligible to any portion of the population, no matter whether their appeal is ex-

tensive or esoteric. Since the Postmaster General disavows the nonmailability of the issues of the periodical he had before him and since Congress did not qualify "literature, the sciences, arts" by any standards of taste or edification or public elevation, the Postmaster General exceeded his powers in denying this periodical a second-class permit.

It seems to me important strictly to confine discussion in this case because its radiations touch, on the one hand, the very basis of a free society, that of the right of expression beyond the conventions of the day, and, on the other hand, the freedom of society from constitutional compulsion to subsidize enterprise, whether in the world of matter or of mind. While one may entirely agree with Mr. Justice Holmes, in *Leach* v. *Carlile*, 258 U. S. 138, 140, as to the extent to which the First Amendment forbids control of the post so far as sealed letters are concerned, one confronts an entirely different set of questions in considering the basis on which the Government may grant or withhold subsidies through low postal rates, and huge subsidies, if one is to judge by the glimpse afforded by the present case. It will be time enough to consider such questions when the Court cannot escape decision upon them.